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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of OSCAR U. and
LETICIA V. SANCHEZ.

OSCAR U. SANCHEZ,

Appellant,

v.

LETICIA V. SANCHEZ,

Respondent.

D056213

(Super. Ct. No. EFL04701)

APPEAL from an order of the Superior Court of Imperial County, Juan Ulloa,
Judge. Affirmed.

In 2006 Oscar Sanchez (Oscar) obtained a default judgment dissolving his marriage to Leticia Sanchez (Leticia). The 2006 judgment awarded Oscar sole legal and physical custody of the parties' two minor children, and also divided the parties' property. One year later, Leticia filed a motion to set aside the default judgment and, as an alternative to setting aside the judgment relating to the custody order, filed a companion

Order to Show Cause (OSC) to modify custody. In 2008 the court ordered the default judgment be set aside as to the property issues, modified the custody arrangements, and set a hearing to address unresolved issues.

At the 2009 hearing, the court ordered custody be changed from Oscar to Leticia based on a change in circumstances from those existing in 2006. Oscar claims the court did not have jurisdiction to enter the 2009 custody order.

FACTUAL AND PROCEDURAL BACKGROUND

A. The 2006 Default Judgment

In 2005 Oscar filed a petition to dissolve his marriage to Leticia. He sought and obtained entry of a default judgment that dissolved the marriage, awarded sole legal and physical custody of the children to Oscar, and divided the property between Oscar and Leticia.

B. The 2007 Set-aside Motion and OSC

In 2007, Leticia filed a motion to set aside the default judgment, asserting Oscar had induced her to not respond to the proceedings through extrinsic fraud. She asserted the property division contained in the default judgment was improper because he had not told the court of the true value of their house or about other community assets. Leticia concurrently filed an OSC re Modification of the Child Custody Order, arguing the children's best interests were served by placing them with her.

The parties stipulated to an order that continued the hearing on Leticia's motion and OSC, which order directed the parties to mediation on the custody issues, and provided an agreed custody schedule pending the new hearing date. The parties attended

mediation and agreed to joint legal custody but were unable to agree on either physical custody or the primary residence for the children. Accordingly, the custody issues were referred back to Judge Flores. Oscar filed responsive declarations detailing his claims that Leticia engaged in irresponsible behavior, and requested (1) the parties be granted joint legal custody; (2) he be granted sole physical custody or, alternatively, the parties be granted joint physical custody with Oscar designated as primary residential caretaker; (3) Leticia receive a specific schedule for access to the children, and (4) the court limit its review of the property issues to unadjudicated assets.

C. The Hearing and 2008 Order

At a February 4, 2008, hearing, the parties reported their lack of agreement on nearly all issues.¹ After lengthy discussion, Judge Flores entered an order (apparently under Fam. Code, § 2121, subd. (b)), that set aside the default judgment as to the property issues and set a hearing to determine those issues. Judge Flores also engaged in a lengthy discussion with counsel concerning how physical custody would be shared, and ultimately stated as to custody that "pending final adjudication" the court would endorse the agreement reached in mediation regarding legal custody, and "[w]ith regard to the unresolved issues" would institute a certain shared custody schedule. Additionally, when Leticia's counsel pointed out that the division of physical custody for the summer months was not specified in the court's shared custody schedule, Judge Flores stated that, "I'm going to reserve on that. I mean, we can change it before the summer. We have a few

¹ They agreed only that (1) the judgment on status should be preserved and (2) they would share legal custody.

months to go." Judge Flores also ordered, "pending final adjudication," a further case management conference for May 19, 2008.

The subsequent written order incorporating the court's February 4, 2008, rulings, entered May 8, 2008, stated the default judgment was set aside "as to the issues of division of property and obligations," and stated the custody and visitation orders were modified according to a specified schedule, but without addressing the summer schedule.

D. The Continued Hearing and the Challenged 2009 Order

After several continuances of the case management conference, the parties appeared before Judge Flores on November 3, 2008, the scheduled trial date. Although Oscar apparently represented in his settlement conference statement that custody issues had been settled and only property issues remained for trial, Leticia disputed that custody issues had been resolved. After lengthy colloquy, during which Judge Flores recognized Leticia was unprepared for trial, the court agreed to continue the trial and ordered Leticia to provide written papers outlining her position and evidence on the property issues, and also provide a specific proposal for shared physical custody. When Oscar asked why the custody plan entered in early 2008 "does . . . not count anymore," Judge Flores stated, "I am taking that . . . as a temporary order, and the judgment will supersede all temporary orders." The court then set a trial date for March 2009.

The trial, held March 5, 2009, before Judge Ulloa, altered the custody arrangement over Oscar's objection that the court did not have jurisdiction to alter custody. Judge Ulloa, after concluding there were changed circumstances such that a change in custody

was in the best interests of the children, entered a judgment changing primary physical custody from Oscar to Leticia. Oscar appeals this judgment.

ANALYSIS

Oscar argues the judgment is void because the 2008 order was a new permanent custody order. From this predicate, Oscar asserts the court was without jurisdiction to modify that permanent custody order absent a new OSC filed by Leticia subsequent to the entry of the 2008 order, and the court abused its discretion by modifying the 2008 permanent custody order because there was no showing of changed circumstances between the time of the 2008 order and the 2009 trial.

Oscar does not assert that, if Judge Flores's interpretation of the 2008 custody order—as only a temporary order pending trial—is correct, a new OSC and proof of changed circumstances would have been required before the court at trial could have jurisdiction to modify that temporary order. (See Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 17:297, p. 17-70 (rev. #1 2006). Oscar also does not assert that, assuming Judge Flores's interpretation of the 2008 custody order as a temporary order pending trial is correct, the trial court's subsequent conclusion that there were changed circumstances from the time of the *original* 2006 order and the 2009 judgment (and such changed circumstances made a change in custody in the children's best interests) would be an abuse of discretion.

We therefore evaluate whether Judge Flores's interpretation of the 2008 custody order as a temporary order pending trial, rather than as a new permanent custody order modifying the original 2006 default custody order, is supported by the record.

Significantly, it was Judge Flores who both entered the contested 2008 order and responded to the procedural objection (i.e. that custody issues had been settled by the 2008 order) by stating he was "taking that . . . as a temporary order, and the judgment will supersede all temporary orders." As a general rule, a trial court has the authority to construe and clarify its own order (*Ballas v. Ballas* (1963) 217 Cal.App.2d 129, 132), and a reviewing court ordinarily accords deference to the interpretation adopted by the lower court of its own orders. (See, e.g., *Fredericksburg Const. Co., Inc. v. J.W. Wyne Excavating, Inc.* (Va. 2000) 260 Va. 137, 530 S.E.2d 148; accord, *Moore v. Moore* (Ariz.App. 1969) 10 Ariz.App. 83, 456 P.2d 403.)

The construction adopted by Judge Flores of his 2008 custody order as a temporary order, to which we accord deference, is supported by the record. When discussing the "set-aside" order vacating the 2006 default orders, Judge Flores set aside the judgment as to unresolved property division issues. Judge Flores then declared he would also modify the existing custodial arrangement with "*my order, and [its] pending . . . pending final adjudication*" (italics added) for a specified custody arrangement handling the "unresolved issues." The temporary nature of the specified arrangement was later confirmed during that hearing when Judge Flores, responding to Leticia's counsel's comment that the court's shared custody schedule had not addressed the division of physical custody for the summer months, stated, "I'm going to reserve on that. I mean, we can change it before the summer. We have a few months to go." The record from the February 4, 2008, hearing supports Judge Flores's later statement at the November 3, 2008, hearing, construing the intent of his February 4, 2008, order regarding custody, that

"I am taking that [February 4, 2008, order] as a temporary order, and the judgment will supersede all temporary orders."

Oscar asserts the written May 8, 2008, order (which included Judge Flores's February 4, 2008, order) contains language expressly stating the court "reserves the issues of division of property and obligations" but contains no language suggesting the custody questions were similarly "reserved" for later adjudication, and therefore the custody order was necessarily a final determination.² However, the written May 8, 2008, order does not state it was a permanent custody order, and did not resolve the issues of physical custody during the summer months. Moreover, to the extent there is a discrepancy between the written order and the reporter's transcript of the court's actual order, the order contained in the reporter's transcript generally prevails as the official record of proceedings. (Cf. *Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 569-570; *In re Josue G.* (2003) 2003) 106 Cal.App.4th 725, 731, fn. 4.)

We conclude the record supports the construction that the 2008 custody order was only a temporary custody order pending trial, and therefore Judge Ulloa had jurisdiction to enter a permanent custody order different from the temporary order without any

² Oscar also argues that, because there is an October 3, 2008, minute order reflecting that the court (responding to Leticia's request to change the current custody order) said Leticia would need to file a motion showing a change in circumstances, the court understood the current custody order *was* a permanent order. However, there is no reporter's transcript of that proceeding, and the court's comment could also be construed as stating its belief that the *temporary* custody order would remain in effect pending final adjudication *unless* Leticia showed a change in circumstances justifying alteration of the temporary custody order.

requirement that Leticia file a new OSC or demonstrate a change in circumstances between the 2008 order and the 2009 order.

DISPOSITION

The judgment is affirmed. Leticia is awarded her costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.